IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 25, 2006

STATE OF TENNESSEE v. BRIAN EDWARD EGGLESTON

Direct Appeal from the Circuit Court for Marshall County
No. 16292 Donald Harris, Judge

No. M2006-00210-CCA-R3-CD - Filed May 30, 2007

A Marshall County Circuit Court jury convicted the appellant, Brian Edward Eggleston, of five counts of child rape and four counts of aggravated sexual battery. After a sentencing hearing, the appellant received an effective twenty-year sentence in the Tennessee Department of Correction. On appeal, he contends (1) that the child rape statute is unconstitutional because it is a strict liability crime and does not allow for a mistake of fact defense; (2) that the trial court erred by denying his motion to suppress his statement to police; (3) that the trial court erred by admitting into evidence an inflammatory comment made by the appellant; (4) that a State witness committed several instances of misconduct; (5) that the State improperly shifted the burden of proof to the defense several times; and (6) that the trial court erred by not granting the appellant's request for a continuance when the State violated the discovery rule and withheld exculpatory evidence. Finding no reversible error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and J.C. MCLIN, JJ., joined.

Karla D. Ogle, Fayetteville, Tennessee, for the appellant, Brian Edward Eggleston.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; W. Michael McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The appellant does not contest the sufficiency of the evidence.[1] At trial, the victim, T.W.,[2] testified that she was born on September 5, 1991, and turned thirteen on September 5, 2004. One day in September 2003, the then twelve-year-old victim and her thirteen-year-old sister, Amber, walked to fifteen-year-old Shelly Mealer's home on Franklin Avenue in Lewisburg, Tennessee. The eighteen-year-old appellant was also at the home and was visiting Shelly's brother, Rodney. Upon meeting the victim, the appellant told her she was pretty. Shelly Mealer saw the victim talking with the appellant and told the appellant, "She's way to young for you." Amber also saw the appellant talking with the victim and told the appellant that the victim was twelve years old.

The victim testified that over the next week or so, she saw the appellant two more times in the neighborhood and spoke with him. On October 3, 2003, the victim was walking to her grandmother's house and saw the appellant again. He told her it was his nineteenth birthday and asked to borrow two dollars. The victim loaned him the money, and the appellant kissed the victim on the top of her head. On January 3, 2004, the victim saw the appellant at the home of Jonathan Leonard, Amber's boyfriend, and the appellant gave the victim his cellular telephone number. On January 6, the victim telephoned the appellant. Later that day, the victim and Amber walked to Leonard's house, and the appellant met the victim there. While Amber and Leonard remained in the home, the victim and the appellant walked to a nearby skateboard park. They sat on some steps at the park, and the appellant told the victim that he wanted to go out with her "[l]ike boyfriend and girlfriend." The victim said that she and the appellant hugged and kissed, that he put his hand into her blue jeans, and that he digitally penetrated her vagina.

The victim testified that on January 8, 9, 10, and 11, she and the appellant returned to the skateboard park and that he digitally penetrated her vagina on each occasion. On January 11, the appellant told the victim that he was leaving Lewisburg the next day in order to attend college in Nashville. The victim stated that on January 13, 15, 18, and 20, she and the appellant walked to the skateboard park, they hugged and kissed, and the appellant digitally penetrated her vagina. On January 24, the victim was spending the night with a friend. About 9:00 p.m., she and the friend walked to a bowling alley because the appellant was there and the victim wanted to see him. Later that night, the appellant and the victim got into the appellant's gray minivan, and the appellant digitally penetrated the victim's vagina. The victim stated that she and the appellant "broke up" and that she did not see him again until March 3.

The victim testified that on March 3, 2004, she telephoned the appellant from a payphone, that he drove to the payphone, and that she left with him in his gray minivan. The appellant drove

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[1]We note that the appellant's brief does not comply with Tennessee Rule of Appellate Procedure 27(a)(6). Pursuant to the rule, it is the appellant's duty to include in his brief a statement of the facts relevant to the issues on appeal with appropriate record references. The statement of facts in the appellant's brief contains no evidence presented at trial.

[2]This court identifies minor victims of sexual abuse by their initials.

the victim to the skateboard park, and they moved from the van's front seats to the van's middle seat. The appellant digitally penetrated the victim's vagina and asked her if she wanted to have sex. The victim thought about it for a few minutes and told him yes. She stated that the appellant penetrated her vagina with his penis and that he asked her not to tell anyone. She stated that on March 9 or 10, she and the appellant had sexual intercourse again in the van. She said that the next day, she telephoned the appellant from the payphone, he picked her up in the van, and they parked on an old road. The victim told the appellant she was having her menstrual period, and he asked her to perform fellatio on him. The victim stated that she performed oral sex on the appellant and that he penetrated her anus with his penis. She said that on May 2, 2004, the appellant drove her to the skateboard park, and she performed fellatio on him. The appellant and the victim stopped seeing each other at that point. Several months later, the victim's mother learned about the victim's relationship with the appellant and contacted the police.

On cross-examination, the victim testified that on August 31, 2004, she met with Officer Rebekah Lambert and told the officer that she had sex with the appellant one time. Later that day, however, she met with Detective Carol Jean and told Detective Jean "the whole thing." She acknowledged that she initially told her mother and the police that she and the appellant had "vaginal-penile sex" on January 24, and she acknowledged lying about having sexual intercourse with the appellant on that date. She stated that although the appellant attended college in Nashville, he would return to Lewisburg on Tuesday and Thursdays. The appellant also returned to Lewisburg on Wednesday, March 3, because he had a bad day at school. She said she told the appellant she was twelve years old when she first met him, and she denied telling him she was about to obtain her driver's license.

The victim's fifteen-year-old sister, Amber, testified that she was with the victim when the victim first met the appellant at the Mealer home in September 2003. The appellant told the victim she was cute, and Amber told the appellant, "She's only twelve, you don't need to be messing with her[.]" Amber stated that during January 2004, she and the victim would go to Jonathan Leonard's house after school and that the appellant was there about five times. Amber and her best friend saw the victim and the appellant hugging and kissing at the skateboard park on one occasion. Amber stated that she also saw the victim and the appellant together at a payphone and that the victim got into the appellant's minivan to talk with him. The victim told Amber she loved the appellant, and Amber eventually told her mother about the victim's and the appellant's relationship. On cross-examination, Amber testified that she never saw the victim having sex with the appellant or performing oral sex on him.

Daryl Ann Winstead, Amber's best friend, testified that she saw the victim and the appellant together once or twice and that she and Amber went with the appellant and the victim to the skateboard park one time. Winstead said she saw the appellant and the victim kissing at the park.

Maletha Bright, the victim's mother, testified that during the third week of January 2004, she found a letter the victim had written to the appellant. The appellant's cellular telephone number was in the victim's notebook, and Bright telephoned him. The appellant told Bright he was fourteen

years old. Bright told the appellant the victim was only twelve, and the appellant said he would leave the victim alone. On February 28, 2004, Bright telephoned the appellant's mother, told her that the victim was only twelve, and asked her to help keep the appellant and the victim away from each other. While speaking with the appellant's mother, Bright learned the appellant was nineteen years old. The victim was "grounded" from March to August 2004 and was not supposed to go anywhere. However, in August 2004, Bright found another letter the victim had written to the appellant in which the victim asked to meet with him. Bright confronted the victim about her relationship with the appellant, and they argued for several hours. The victim finally told her mother that she had sexual intercourse with the appellant one time on January 24. The next morning, Bright took the victim to a hospital emergency room. On cross-examination, Bright testified that she later learned no penile-vaginal penetration occurred on January 24.

Eighteen-year-old Rodney Mealer testified that he used to live down the street from the victim's family and that he and the appellant were best friends in high school. He stated that the appellant told him about the appellant's relationship with the victim and that the appellant claimed to be having sex with her. The appellant also told Mealer that he knew the victim was twelve years old. Mealer testified that he told the appellant, "It would be wise to leave her alone since she's that young" and that the appellant replied, "Pussy is pussy." Troy Thomas, another friend of the appellant, testified that the appellant claimed to be having sex with a girl about twelve years old.

Detective Carol Jean of the Lewisburg Police Department testified that she was called to a hospital emergency room on August 31, 2004, and spoke with the victim. On September 7, 2004, Detective Jean and Detective Kevin Patin drove to an auto mechanics college in Nashville and spoke with the appellant. The appellant admitted having consensual sex with the victim one time in his van. Detective Jean questioned the appellant about the victim's age, and the appellant told her that he thought the victim was "much older." When Detective Jean pressured the appellant about the victim's specific age, he told her that he thought the victim was sixteen or seventeen. On cross-examination, Detective Jean stated the appellant was not arrested at that time because she had not yet spoken with the district attorney and "still had some more legwork to do on the investigation."

Dr. Donald Hayes Arnold, a medical consultant for Our Kids Clinic, testified that he examined the victim on September 15, 2004, and that the victim had a normal vaginal hymen. He stated that ninety-five percent of the time, injuries to a hymen will heal in one to three days and will leave no evidence of an injury. He said that even in cases with repeated penetration, the hymen will have a normal appearance. Dr. Arnold also conducted an anal exam, and the results of that exam were normal. On cross-examination, Dr. Arnold stated that he could not say one way or the other whether the victim had sexual intercourse.

Dee Anna Wilson, an education coordinator for Nashville Auto Diesel College, testified for the appellant that she kept records of class attendance at the school and that the appellant missed twenty hours of classes between October 14, 2003, and March 2004. She stated that the appellant was present for his classes on January 6, 8, 9, 13, 15, and 20 and March 3, 9, and 10. She stated that no classes were held on January 24, 2004, or May 2, 2004, because those days were a Saturday or

a Sunday. On cross-examination, Wilson testified that the appellant's classes were scheduled from 6:40 a.m. to 1:40 p.m., and she acknowledged that he would have been able to drive from Nashville to Lewisburg by 4:00 p.m. after his last class.

Edward Eggleston, the appellant's father, testified that in January 2004, he owned a 1996 silver Dodge minivan and that the appellant drove the van. Sometime in mid-January, the van became inoperable and had to be repaired. Eggleston said the appellant was attending school in Nashville while the van was at the repair shop. The appellant's father drove to Nashville in order to pick up the appellant from school on weekends and drove the appellant back to school on Sunday nights.

Lisa Marie Eggleston, the appellant's mother, testified that the minivan was inoperable for a few weeks in January. She stated that on weekends, her husband drove to Nashville to pick up the appellant and brought him home. In February or March 2004, a girl kept telephoning the Eggleston house and hanging up. Tired of the calls, Lisa Eggleston got the caller's telephone number from "caller ID" and dialed the number. She stated that she spoke with a woman and that the woman said she had a twelve-year-old daughter claiming to be dating a nineteen-year-old. Eggleston told the woman that her son was nineteen and that his relationship with the twelve-year-old "would stop right there and then." When the appellant got home from school that weekend, Eggleston talked with him about his relationship with the victim.

Robert Lee Crane testified that he was a friend of the Eggleston family and repaired the Eggleston's minivan. He thought he repaired the van on January 4, 2004, and kept the van for about two days.

On rebuttal, Maletha Bright testified for the State that she spoke with the appellant on his cellular telephone about the third week in January. A couple of days later, she telephoned the appellant's mother and asked her to keep the appellant away from the victim. In March, Bright telephoned the appellant's mother again. She said the appellant's mother never telephoned her.

The State originally charged the appellant with seventeen counts of child rape for his having digitally penetrated the victim's vagina on January 6 (count 1), 8 (count 2), 9 (count 3), 10 (count 4), 11 (count 5), 13 (count 6), 15 (count 7), 18 (count 8), 20 (count 9), 24 (count 10), and March 3 (count 12); for his having penetrated the victim's vagina with his penis on January 24 (count 11), March 3 (count 13), and March 9 or 10 (count 14); for his having penetrated the victim's anus with his penis on March 10 or 11 (count 16); and for the victim's having performed fellatio on him on March 10 or 11 (count 15) and May 2 (count 17). Four days before trial, the State dismissed count 11. The jury found the appellant guilty of child rape in counts 4, 12, 13, 15, and 16; guilty of aggravated sexual battery in counts 1, 2, 3, and 5; and not guilty in counts 6, 7, 8, 9, 10, 14, and 17. After a sentencing hearing, the trial court ordered the appellant to serve concurrent sentences of twenty years for the rape convictions and eight years for the aggravated sexual battery convictions.

II. Analysis

A. Constitutionality of Child Rape Statute

The appellant claims that the rape of a child statute, Tennessee Code Annotated section 39-13-522, is unconstitutional because it is a strict liability crime and does not allow for a mistake of fact defense. See Tenn. Code Ann. § 39-11-502(a). The State argues that the appellant has waived this issue because he failed to raise it in his motion for new trial. We note that in addition to not raising the issue in his new trial motion, the appellate record does not contain any pretrial motion to dismiss the indictments based upon the statute's unconstitutionality. This court has held on numerous occasions that an appellant's failure to raise a constitutional challenge to a statute in a pretrial motion will result in a waiver of the issue on appeal pursuant to Tennessee Rule of Criminal Procedure 12(b)(2). See State v. Rhoden, 739 S.W.2d 6, 10 (Tenn. Crim. App. 1987); State v. Farmer, 675 S.W.2d 212, 214 (Tenn. Crim. App. 1984); see also State v. Smith, 48 S.W.3d 159, 162 n.1 (Tenn. Crim. App. 2000). Moreover, Tennessee Rule of Appellate Procedure 3(e) provides that failure to specifically state an issue in a motion for new trial results in a waiver of the issue on appeal. Because the appellant failed to file a pretrial motion challenging the constitutionality of the rape of a child statute and failed to raise the issue in his motion for a new trial, the issue has been waived.

B. Motion to Suppress

The appellant contends that the trial court erred by denying his motion to suppress his statement to police. He argues that the police knew when they interviewed him on September 7, 2004, that he had retained an attorney in a similar case and that they deprived him of his attorney during his September 7 interview. He also argues that the police in the instant case may have learned about the victim's allegations as early as May 2004 yet deliberately waited until September 22, 2004, to indict him in order to gain a tactical advantage over the defense. The State argues that the trial court properly denied the appellant's motion to suppress. We agree with the State.

The appellant filed a pretrial motion, arguing that the trial court should suppress his September 7 statement to police because he requested an attorney and because the officers failed to advise him of his Miranda rights. At the motion hearing, the appellant testified that on September 7, 2004, he was a student at Nashville Auto Diesel College. A college security guard got the appellant out of class and led him to a security office, where Detectives Carol Jean and Kevin Patin were waiting. The guard left the appellant in the office with the detectives and locked the door. The officers told the appellant they needed to speak with him about a case but refused to tell him anything about the case until he signed a waiver of rights form. The appellant had been questioned about a statutory rape case involving a girl named Kim and believed the officers were there to speak with him about that case. The appellant signed the waiver of rights form, and the officers told him they were there to speak with him about a case involving T.W. The appellant asked to speak with his attorney, who was representing him in the statutory rape case, but the officers told him that he had "signed away that right" and would have to talk with them about the instant case. The appellant said that he did not feel he was free to leave the office because the door was locked and that he gave

a statement to the officers. He said that Detective Jean wrote out the statement in her own words, that he felt like he was under arrest, and that he signed the statement.

On cross-examination, the appellant acknowledged that he had been arrested in case number 16293 for five counts of statutory rape involving Kim on June 30, 2004, and that he gave a statement to police on that date. He said that on September 7, an African-American security guard, about six feet, one inches tall, got him out of class and took him to the security office. Before the guard left the appellant in the office with the detectives, the guard told them to "tap" on the door when they were ready to leave. Although the guard was not present in the office during the interview, he waited outside. The appellant stated that the guard did not say the office door was locked but that the appellant presumed it was locked. The appellant said that he read the waiver of rights form, that the officers did not read the form to him, and that he understood the form. The appellant gave a statement to the officers, Detective Jean wrote out the statement using her own words, and the appellant signed it. The appellant was not arrested at that time and returned to class after the interview. He denied telling Detective Jean that he had sex with the victim and said he signed the statement because he believed the officers would let him go if he signed it. When the interview was over, the detectives tapped on the door, and the guard opened it.

Steve Murff, the Security Director for Nashville Auto Diesel College, testified for the State that police officers came to the college on September 7, 2004, and asked to meet with the appellant. Murff, who stated he is Caucasian and five feet, seven inches tall, got the appellant out of class and took him to a security office. Murff said he did not handcuff the appellant, never told the detectives or the appellant to tap on the door, and never locked the door. He said he left the appellant with the detectives and went on patrol. On cross-examination, he said two African-American, six-foot-one-inch-tall security guards worked for him.

Detective Carol Jean testified that on September 7, 2004, Steve Murff brought the appellant into the security office and left. The office door was unlocked, and Murff did not tell the officers to tap on the door in order to get out of the office. Detective Jean introduced herself and Detective Patin to the appellant and asked the appellant if he knew why she was there. The appellant believed Detective Jean was there to talk with him about Kim, but Detective Jean told him she was there to discuss another matter. She read the appellant his rights from a waiver of rights form. The appellant read the form to himself and initialed every line on the form. He read the waiver portion of the form aloud, and he told her he understood his rights. Detective Jean said the appellant never mentioned his attorney from the statutory rape case, never asked for an attorney, and never asked to stop the interview. Detective Jean never told the appellant he was not free to leave and never told him the office door was locked. She also did not tell the appellant that he could not speak with an attorney because he had already waived his rights. At first, the appellant told Detective Jean he did not do anything sexual with the victim. However, he later told her he had consensual sex with the victim. Detective Jean stated that she wrote out the appellant's statement using the appellant's words and that he signed the statement. After the interview, the officers walked out of the office, which was unlocked. On cross-examination, Detective Jean testified that she knew the appellant had an attorney

in the statutory rape case, and she acknowledged that the appellant was indicted in the instant case on September 22, 2004.

Lewisburg Police Detective Kevin Patin testified that he was present during Detective Jean's interview with the appellant but that he did not ask the appellant any questions. Steve Murff brought the appellant to the security office, and Detective Jean read the appellant his rights. The appellant read aloud the waiver paragraph from the form, signed the form, and gave a statement. The appellant never asked to leave and never asked for an attorney. Detective Patin said the office door was unlocked. On cross-examination, Detective Patin testified that he did not see an African-American security guard on September 7 and that he did not recall the appellant asking for an attorney.

The trial court concluded that Detective Jean read the appellant his rights. The court noted that the appellant testified he understood those rights and signed a waiver of rights form. The court held that the appellant never asked for an attorney and never asked to stop the interview. It denied the appellant's motion to suppress his statement.

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Id. Nevertheless, appellate courts will review the trial court's application of law to the facts purely de novo. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). Furthermore, the State, as the prevailing party, is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." Odom, 928 S.W.2d at 23. We note that "in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998).

In Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966), the United States Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." These procedural safeguards require that police officers must advise a defendant of his or her right to remain silent and of his or her right to counsel before they may initiate custodial interrogation. State v. Sawyer, 156 S.W.3d 531, 534 (Tenn. 2005). If these warnings are not given, statements elicited from the individual may not be admitted in the prosecution's case-in-chief. Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 1528 (1994). A waiver of constitutional rights must be made "voluntarily, knowingly and intelligently." Miranda, 384 U.S. at 444, 86 S. Ct. at 1612. In determining whether a defendant has validly waived his Miranda rights, courts must look to the totality of the circumstances. State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992). "Custodial" means that the subject of questioning is in "custody or otherwise deprived of his freedom by the authorities in any significant way." Miranda, 384 U.S. at 478, 86 S. Ct. at 1630. Our

supreme court has expanded this definition of custodial to mean "whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest." State v. Anderson, 937 S.W.2d 851, 855 (Tenn. 1996).

In the instant case, the appellant contends that the trial court erred by denying his motion to suppress because he was "in custody" for Miranda purposes and invoked his right to an attorney. We disagree. The trial court obviously accredited the witnesses' testimony over the appellant's. Steve Murff and the detectives testified that the door to the office was not locked, and Detective Jean testified that she did not tell the appellant he could not leave the office. After the interview, the detectives did not arrest the appellant, and he returned to class. We conclude that the appellant was not in custody during the interview. In any event, Detective Jean testified that she Mirandized the appellant before the interview, that the appellant signed a waiver of rights form, that he gave a statement, that he signed the statement, and that he never requested his attorney. The record reflects that the appellant signed a waiver of rights form and that he initialed each of his rights. The appellant testified at the hearing that he understood his rights and gave a statement. Although an attorney may have been representing the appellant in his statutory rape case, the Sixth Amendment right to counsel "is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced.'" Sepulveda v. State, 90 S.W.3d 633, 638 (Tenn. 2002) (quoting McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S. Ct. 2204, 2207 (1991)). We conclude that the appellant was advised of his Miranda rights and voluntarily gave a statement. The trial court properly denied his motion to suppress.

As to the appellant's argument that the police intentionally delayed indicting him in order to gain a tactical advantage over the defense, we find no merit to this claim. The victim's mother testified at trial that she learned about the victim's and the appellant's relationship in August 2004 and that she took the victim to the emergency room the next day. Detective Jean learned about the allegations on August 31, 2004, when she was called to the emergency room. She spoke with the victim that day and interviewed the appellant one week later. Detective Jean testified that she did not arrest the appellant on September 7 because her investigation was incomplete and that the State indicted him in this case on September 22. The appellant has made no showing that the State intentionally delayed indicting him in order to gain a tactical advantage. We conclude that he is not entitled to relief.

C. Appellant's Inflammatory Statement

Next, the appellant claims that the trial court erred by allowing the jury to hear that he told Rodney Mealer, "Pussy is pussy." He argues that the comment was highly inflammatory and unnecessarily prejudicial because the State could have offered other evidence to show the appellant did not care that the victim was only twelve years old. The State contends that the trial court properly admitted the comment because it was probative to show the appellant disregarded the victim's age. The State also argues that the appellant failed to show that the comment's prejudicial

effect outweighed its probative value or that the State introduced the comment in order to inflame the jury. We conclude that the appellant is not entitled to relief.

During the prosecutor's opening statement, he told the jurors that they would hear testimony from Rodney Mealer. The defense objected, anticipating that the prosecutor was about to inform the jury that the appellant told Mealer, "Pussy is pussy." In a bench conference, the defense argued that the appellant's comment was hearsay, that it would inflame the jury, and that the probative value of the comment was substantially outweighed by the danger of unfair prejudice as provided in Tennessee Rule of Evidence 403. The trial court concluded that the comment was admissible hearsay because it was the appellant's admission and overruled the objection. The prosecutor's opening statement resumed, and he told the jury that Mealer "tried to advise [the appellant] or question[ed] him [as to] why he was doing something like this with a 12 year old -- and, again, these are not my words, they are the defendant's -- his comeback was 'pussy is pussy.'" During the trial, Rodney Mealer testified, over the defense's renewed objection, about the appellant's comment.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401; see also State v. Kennedy, 7 S.W.3d 58, 68 (Tenn. Crim. App. 1999). Tennessee Rule of Evidence 402 provides that "[a]ll relevant evidence is admissible except as [otherwise] provided. . . . Evidence which is not relevant is not admissible." However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

Rape of a child is, in pertinent part, the "unlawful sexual penetration of a victim by the defendant . . . if the victim is more than three (3) years of age but less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-522(a). During the bench conference, the State argued that the appellant's comment was admissible because it demonstrated he knew the victim was only twelve years old. However, Tennessee Code Annotated section 39-11-502(a) specifically provides that ignorance or mistake of fact is no defense to prosecution for rape of a child. Therefore, the appellant's knowledge about the victim's age was irrelevant and did not justify admitting the statement into evidence. Nevertheless, in light of the victim's testimony, other witnesses' testimony that the appellant told them he was having sex with the victim, and the appellant's admitting to police that he had sex with the victim, we conclude that the trial court's error was harmless. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

D. Witness Misconduct

Next, the appellant contends that Detective Carol Jean acted inappropriately during the trial by (1) consulting with a juror during a break, (2) making a "dramatic display of embrace and drama" as the victim stepped off the witness stand, and (3) coaching another State witness with head-nods and hand-signals as the witness was testifying. The appellant contends that the trial court should have declared a mistrial or given curative instructions. The State contends that the appellant is not

entitled to relief because he never requested a mistrial or a curative instruction and, therefore, has waived the issue. We agree with the State.

Before the prosecutor began his opening statement and the jury entered the courtroom, the prosecutor requested that all witnesses be sequestered but stated that Detective Jean would remain in the courtroom for the State. The defense did not object but told the trial court that a female juror had just informed the defense that she had a conversation with Detective Jean and/or the prosecutor at the prosecutor's table during a break. The defense told the trial court, "I don't know what the discussion was about, if anything, of any pertinence, but his -- the defendant's parents came to me." The prosecutor stated, "I can't speak for Ms. Jean, but . . . I've never spoke to the lady. I don't know the lady." The trial court asked the defense if it wanted the court to question Detective Jean and the juror, and the defense said, "I think I would . . . because they made a big deal out of it." After opening statements, the jury left the courtroom and the trial court asked Detective Jean if she had spoken with one of the jurors. Detective Jean stated that she and the juror used to live in Bell Buckle, Tennessee, that they were talking about the town, and that she and the juror did not discuss the case. The trial court then questioned the juror, and the juror said, "The only thing we discussed was how we enjoyed living in Bell Buckle, growing up there." The juror stated that she would not talk with Detective Jean anymore, and the trial court asked the State and the defense if they wanted to question her. Neither party wanted to question the juror.

Regarding the second incident, during the victim's testimony, the trial court took a recess for a fifteen-minute break. After the break but before the jury returned to the courtroom, the defense informed the trial court that as the jurors had been exiting the courtroom, Detective Jean walked over to the victim and hugged her. The defense stated that the display was an "appearance of impropriety." The trial court instructed the detective to "refrain from doing that because you can stop this trial, if that happened." Detective Jean told the trial court, "I was standing there. [The victim] was upset. She came up to me, sir." The trial court told Detective Jean not to have contact with the victim again until the jury left the courtroom. The jury returned to the courtroom, and the victim's testimony resumed.

As to the third incident, after Daryl Ann Winstead's testimony, a juror asked to speak with the trial court. The trial court took a recess and spoke with the juror in the attorneys' presence. The juror told the trial court that while the defense was cross-examining the victim, the "victim got a little bit flustered and the detective made some motions to her, some hand motions." The juror demonstrated the motions for the court, the court asked the juror if the detective's actions would affect his consideration of the case, and the juror said no. The trial court told the State that it had been watching the detective and that "she's just bobbing her head or making facial expressions, and I think that she's just maybe too close to this case." The prosecutor said that he did not have time "to be baby-sitting a police officer" and agreed to keep Detective Jean out of the courtroom. The trial resumed without any further incident involving Detective Jean.

Initially, we note that in addition to these three examples of inappropriate behavior mentioned in the appellant's brief, the defense also had to ask the trial court to stop Detective Jean from shaking

her head during the defense's opening statement. We are dismayed that, despite repeated problems with the detective's behavior, the State would not control its witness. However, the appellant never requested a mistrial and never requested a curative instruction. Each time the appellant brought the detective's inappropriate behavior to the trial court's attention, the trial court addressed the incident. The defense requested no further action and, therefore, has waived any further claim regarding this issue. See Tenn. R. App. P. 36(a).

E. State's Burden of Proof

The appellant claims that the State shifted the burden of proof to the defense several times during its cross-examination of the defense's witnesses. The State contends that the appellant waived this issue because he failed to make any contemporaneous objections. We conclude that he is not entitled to relief.

During Edward Eggleston's testimony, he stated that the appellant's silver minivan was inoperable in mid-January 2004, that he had the van towed to Robert Crane's shop, and that Crane kept the van for two or three days. He also said that while the minivan was being repaired, the appellant was at school without transportation and that he spoke with the appellant during the week on the telephone. On cross-examination, the State asked Eggleston if he had tried to get records from the towing company or Robert Crane in order to determine the exact date the minivan was repaired. The State also asked if he had brought any telephone bills to court in order to prove that he spoke with the appellant during the week. Eggleston said he had not gotten the records from the towing company or Crane because he "did not think of it" and that he had not brought any telephone bills to court. Lisa Eggleston also testified that in January 2004, she spoke with the appellant during the week over the telephone. On cross-examination, the State asked her why she had not brought telephone records to court to prove that she spoke with the appellant on certain dates. During the prosecutor's closing statement, he reminded the jury that the witnesses' failed to bring any records to support their testimony.

The appellant claims that the State's asking the Egglestons about their failure to bring the records to court shifted the burden of proof to the defense. However, the appellant never raised any objections to the State's cross-examination of these witnesses and has waived the issue. See Tenn. R. App. P. 36(a). In any event, we believe the State's asking the witnesses why they did not bring the records went to the witnesses' credibility and did not shift the burden of proof to the defense. Moreover, our review of the trial court's instructions to the jury reveal that the trial court properly instructed the jury that the State was required to prove all of the elements of the crime beyond a reasonable doubt. See State v. Butler, 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994) (providing that we generally presume a jury has followed the trial court's instructions). We conclude that the appellant is not entitled to relief.

F. Motion to Continue

Finally, the appellant claims that the trial court committed reversible error by denying a motion to continue that he filed on the morning of trial, May 23, 2005. Before the first witness testified, the trial court held a hearing on the motion. In the hearing, the defense argued that the State had failed to comply with a discovery order by withholding exculpatory information that the victim lied to Officer Rebekah Lambert about having sexual intercourse with the appellant on January 24, 2004. The defense also alleged that the State failed to give the defense notes Officer Lambert took during an interview with the victim. The defense stated that it needed more time to research the newly discovered evidence and the officer's notes but that "we are prepared to move forward in case you don't decide that that's what we need to do." The State told the trial court that as soon as it had received the officer's exculpatory information, it had faxed the information to defense counsel. The State also informed the court that it did not obtain the officer's report until May 17, 2005, and that the defense was welcome to look at the report. The trial court denied the appellant's motion to continue, stating that the defense could interview the officer "at some point if you'll tell me when you want to do that," and the defense stated, "That will [be] fine. That will be fine, Judge. Thank you." On appeal, the appellant contends that the State failed to comply with the rules of discovery and withheld exculpatory evidence.

Tennessee Rules of Criminal Procedure 16(a)(1)(C) provides that upon a defendant's request, the State must allow the defendant to inspect and copy certain evidence which is material to the preparation of the defendant's defense or that the State intends to use as evidence in its case-in-chief. If the State fails to comply with this rule, the trial court has the discretion to fashion an appropriate remedy, including granting a continuance or prohibiting the introduction of the evidence. Tenn. R. Crim. P. 16(d)(2). Furthermore, in Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963), the United States Supreme Court held that the State has a constitutional duty to furnish the defendant with exculpatory evidence pertaining to the defendant's guilt or innocence or to the potential punishment faced by the defendant. In order to prove that a Brady violation exists, the defendant must show that: (1) he requested the information (unless the evidence is obviously exculpatory, in which case the State is obligated to release such evidence regardless of whether or not it was requested); (2) the State suppressed the information; (3) the information was favorable to the defendant; and (4) the information was material. Id.

In the instant case, there is no evidence that the State withheld exculpatory information. The State informed the trial court that as soon as it received information regarding the victim's lying about the January 24 incident, it immediately faxed that information to defense counsel. Moreover, although the appellant argued that it had been unable to interview Officer Lambert and had not received her report, the trial court concluded that the "appropriate remedy" in this case was to allow defense counsel to speak with the officer. Defense counsel stated that this remedy was "fine," and the appellant has made no argument concerning any potential prejudice he suffered because of the trial court's denial of his request for a continuance. We conclude that he is not entitled to relief.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE